

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

March 18, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2769

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**IN THE MATTER OF THE ESTATE OF
VIOLA M. TADYCH, DECEASED:**

RICHARD TADYCH and LAWRENCE E. SLAVIK,

Appellants,

v.

JOHN T. TADYCH and MICHAEL D. SANGER,

Respondents.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN F. FOLEY, Judge. *Affirmed and cause remanded with directions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Richard Tadych, an heir to his mother's estate, and Lawrence E. Slavik, his attorney, appeal from the probate court's order denying their request for formal probate of the estate and from the trial court's determination that Tadych's actions were frivolous, resulting in the assessment

of \$2,233 attorney fees and costs. John T. Tadych, the personal representative of the estate, and Michael D. Sanger, his attorney, seek frivolous costs and attorney fees for the appeal. Because Richard Tadych's objection to the disbursements lacked merit, the trial court's decision accepting the total of the final account and finding the disbursements reasonable is affirmed. Additionally, the trial court's finding of frivolousness is upheld because a review of the record and briefs reveals no reasonable basis in law or equity for Richard Tadych's tactics, and his actions cannot be supported by a good faith argument for an extension, modification, or reversal of existing law. We also find his appeal frivolous and remand for a hearing to determine the reasonable attorney fees and costs for this appeal.

I. BACKGROUND.

Viola Tadych died testate on December 25, 1993. She had suffered from Alzheimer's Disease for many years, requiring her family to obtain a power of attorney in order to handle her affairs. When Viola's medical condition worsened, one of her children, Leonard Tadych, Richard Tadych's brother, moved into Viola's home with his live-in girlfriend and her children. They took care of Viola and maintained her home until she died. After her death, an agreement was reached by all the heirs, including Richard, that allowed Leonard and the other members of his household to remain in Viola's home rent-free until the home was sold. In exchange for free rent, Leonard was responsible for certain bills and minor upkeep of the home. John Tadych, another brother of Richard, was appointed personal representative of the estate pursuant to Viola's will and he commenced an informal administration of the estate. The estate, totalling approximately \$93,000, consisted of Viola's home and two bank accounts. After the home was sold, the necessary documents were prepared and a distribution was made to the five heirs, all children of Viola.

After receiving his inheritance check, Richard retained an attorney, Lawrence E. Slavik, who filed a demand for formal probate. Richard's attorney also formally and informally made discovery requests of John's attorney, Sanger. After continuous requests for information, Attorney Sanger filed a motion seeking costs from Richard and a dismissal of Richard's demand for formal probate. Later, Attorney Sanger filed a motion to compel discovery and to impose a protective order. He filed another motion seeking a dismissal of

Richard's demand for formal probate. The trial court did not grant these motions, deciding instead to set a trial date. The trial court, however, did warn the attorneys that: "I will tell you this; if there has been any frivolousness in here, I am going to assess unbelievable costs against these attorneys." A trial was held on July 10, 1995. Following the testimony, the trial court found that Richard's objections to John's various expenditures as personal representative and the informal probate were frivolous. The trial court concluded that they were "without any reasonable basis in law or equity and [could] not be supported by a good faith argument for any extension modification or reversal of existing law." The trial court assessed costs dividing the amount equally between Richard and Attorney Slavik.

The main thrust of Richard's complaints deal with decisions that predate his mother's death. He contends that his brother Leonard's actions prior to their mother's death were improper. He describes his brother as being "divorced from two prior marriages, had a severe drinking problem and owed large sums of support money for the care of his children." He claims that he pursued the estate's closing in a formal matter because there was no accounting of the monies "taken, withdrawn, or diverted from Viola Tadych's pension income, social security and savings accounts for the benefit of Leonard Tadych and the group of people that were living with him in Viola Tadych's home." With this objective in mind, Richard chose to acquire his share of the inheritance and then hire an attorney to challenge the informal administration of the estate.

In his brief, Richard accuses John and Attorney Sanger of operating in complete secrecy. He proffers that the estate was shrouded in secrecy "to hide and conceal the substantial sums of money that Leonard Tadych had withdrawn from his mother's accounts while she was still alive so that the state would not seize the same ... for past due child support payments." Despite his concern over Leonard's significant child support arrearage, the child support agency made no claims for Leonard's share. Although Richard is consistent in his assertion that the estate was not forthcoming with information, the record does not bear out that allegation. Numerous discovery demands were made by Richard after the disbursement of the inherited funds and John responded appropriately. The matter was in probate court twice dealing with Richard's requests for information. Richard claims that he was denied the information he needed to fairly evaluate the situation, but again, the record does not support his contention. Marked as exhibits are numerous letters from Attorney Sanger which reveal his attempt at answering the barrage of questions

posed by Attorney Slavik. The letters also reference the mailing of copies of the documents found in the probate file to Attorney Slavik. Richard's interrogatories were also answered. At a pretrial, the trial court met with the parties and responded to many of Richard's concerns on the record. The trial court seemingly agreed with John's explanations, but gave Richard an opportunity to prove his allegations.

Before trial, Richard peppered opposing counsel with questions dealing with his suspicions and his view of the law; however, at trial he challenged only the probate taxes, painting and carpeting fees, a \$200 check to Leonard, a water bill, and money paid to Wisconsin Title, collectively adding up to approximately \$1,300. He also challenged John's mathematics, claiming that his calculations showed he should have received *less* money than he was given. Richard also alleged that John was commingling the estate's funds with his own funds.

Testimony taken at the trial revealed that the \$200 was given to Leonard for tasks he performed on the house above those agreed upon involving the free rent. Additionally, John testified that another brother and his children were paid \$500 to paint the entire outside of the home, and \$500 was paid for sixty-two yards of carpeting. The real estate broker who testified on behalf of John stated that he had encouraged the family to make the repairs to the home including the carpeting and the painting because he felt the repairs added to the value of the home and were extremely reasonable amounts for the work. All of the challenged expenses were determined to be valid expenses by the trial court. Richard called no witnesses nor introduced any evidence contradicting John's positions. The trial court suggested that Richard return the extra money to the estate if he was unhappy about John's mathematics. The only commingling mentioned at trial was the fire insurance refund which John deposited in his personal account and promptly divided the money, writing checks for the five heirs. With respect to this issue, the trial court opined: "So what. It's an insurance check, and it's divided up. This man is not an attorney. He's a lay person trying to do the best he can to administer the estate. They do that all the time. We have thousands of those every month here. There is nothing dishonest about that."

At the end of the testimony, the trial court remarked: "Because it's total nonsense. I have sat here for 100 years handling these things, and I have

never seen anything like this in my entire life. There's no basis for anything. You should see what objections to estates really are. There is nothing in the situation with regard to this. Your questions are frivolous." Later the trial court said: "The court is also going to find that their actions were without any reasonable basis in law or equity and cannot be supported by a good faith argument for any extension, modification or reversal of existing law. The court is going to find that this is frivolous and assess costs."

II. ANALYSIS

Findings of fact by a court sitting without a jury "will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence." *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 249, 274 N.W.2d 647, 650 (1979). Whether an action is frivolous within the meaning of § 814.025, STATS., is a question of law that we review independently from the trial court. *Lamb v. Manning*, 145 Wis.2d 619, 628, 427 N.W.2d 437, 441 (Ct. App. 1988).

Richard asserts that the trial court erred for several reasons when assessing attorney fees and costs against him and his attorney. As noted, he devotes much of his brief to a litany of complaints against Leonard. He contends Leonard retained large amounts of money that was rightfully his mother's while living with her. Other than the accusations found in Richard's briefs, however, no witness testimony or documentary evidence was submitted that substantiates these allegations. Even if true, it would appear that Richard waited too long to right these alleged wrongs. Leonard's conduct with respect to his mother's finances predate her death and is not relevant to the objected-to expenses explored by Richard at trial.¹ Further, one of his arguments actually strengthens John's position, inasmuch as Richard claims the trial court's frivolous costs determination should be reversed because Richard was "not seeking any damages from the respondent for any negligent or wrongful acts that they may have committed, either by action or omission." One might then ask rhetorically, if no relief was being sought from John, then what was the

¹ According to Leonard's testimony, the care of their mother in her weakened mental condition was extremely stressful for him, and on at least one occasion he was hospitalized as a result of it.

purpose of the time-consuming proceeding which resulted in a forty-three-page transcript and 19.5 hours of billable attorney fees?

On appeal, Richard asserts that John commingled the estate's funds with his own. The only evidence of this was Richard receiving a personal check from John. The trial court noted and approved the practice, as the checks were written to divide an insurance refund sent to John. There is no evidence that John abused his role or retained any estate monies. Nothing new has been raised or argued on appeal on this issue.

In seeking a reversal of the frivolousness finding, Richard contends the trial court made its determination of frivolousness solely on the basis of the size of the estate. While the trial court did allude to the size of the estate, it was not the catalyst for the frivolousness finding. The trial court stated: "This is a very small estate to create all this additional confusion with this little tiny estate. It's just unconscionable. They wanted the family to take care of her [deceased] and didn't even dispose of not one cent in the will that anybody showed anything for wrongly." Implicit in the trial court's statement was the fact that nothing improper had been shown and the small estate was being depleted by Richard's actions.

Richard next argues that the trial court could not assess frivolous costs because "the trial court did not make any findings that any of the parties on either side acted in bad faith." He cites *Stern v. Thompson & Coates, Ltd.*, 185 Wis.2d 220, 517 N.W.2d 658 (1994), for the proposition that a trial court must determine what was in the person's mind and were his or her actions deliberate before making a finding of frivolousness. His reliance on *Stern* is misplaced, however, because its analysis deals with Paragraph 3(a) of § 814.025, STATS.,² not Paragraph 3(b), which is the portion of the statute used by the trial

² Section 814.025, STATS., provides:

Costs upon frivolous claims and counterclaims. (1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

court in the present case. Accordingly, no finding of bad faith is needed in this case to find frivolousness. *Stern*, however, does give guidance because the case points out the distinction between Paragraphs 3(a) and 3(b): A finding of frivolousness under Paragraph 3(b) is based on an objective standard. *Id.* at 241, 517 N.W.2d at 666. The trial court correctly used that standard. The trial court clearly determined that the questions posed by Attorney Slavik were frivolous because the information had been provided earlier and the collective actions of Richard and Attorney Slavik were without any reasonable basis in law or equity. Further, Richard has not argued that he was attempting to change or modify the law. Our reading of the transcript supports the trial court's finding. The amounts were nominal, given the size of the estate, the expenses bareboned, and no suspicious conduct was unearthed. Richard could have easily resolved any questions he had about the expenses without a trial and without filing a motion for formal probate.

Richard also argues that frivolous costs can not be assessed against him or his attorney because the “mini-trial” was held in the judge's chambers and not in the courtroom. Richard cites no case law or statutory authority for support of this specious argument. We deem this argument meritless. He also urges this court to find that the trial court erred because John did not comply

(..continued)

- (2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.
- (3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:
 - (a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
 - (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

with his discovery demands. No finding, however, of a failure by John to comply with discovery demands can be found in the record. Even if John failed to comply with the discovery demands, this fact is not a bar to the trial court's conclusion that the proceeding was frivolous.

Finally, Richard and Attorney Slavik argue that the trial court was not empowered to make a finding against them under § 814.25, STATS., because they are not parties. This argument, too, fails to persuade us. The intent of the statute is "to deter litigants and attorneys from commencing or continuing frivolous actions and to punish those who do so. The trial court must enforce [the statute] for the purpose of maintaining the integrity of the judicial system and the legal profession." *Stoll v. Adriansen*, 122 Wis.2d 503, 511, 362 N.W.2d 182, 187 (Ct. App. 1984). The actions of Richard and Attorney Slavik fall squarely within the conduct addressed by the statute. Although the statute utilizes the terms "plaintiffs" and "defendants," it also references special proceedings as coming within the ambit of the statute. There is also precedent for objectors being held responsible for frivolous costs and attorney fees. See generally *Vierck v. Richardson*, 119 Wis.2d 394, 351 N.W.2d 169 (Ct. App. 1984); *Swartout v. Bilsie*, 100 Wis.2d 342, 302 N.W.2d 508 (Ct. App. 1981).

With regard to Richard's next issue, the trial court accepted the totals of the final account and found that the disbursements were reasonable. Thus, Richard failed in his burden of proof to have the probate formally administered. Given the recitation of the events at trial, we agree. The trial court's decision is affirmed.

Finally, we note that Richard cannot now complain about the \$2,233 in attorney fees and costs because the trial court warned the attorneys that he would be awarding attorney fees and costs if he found frivolousness at trial.

We now turn to John's request for fees under § 809.25, STATS. Much of the arguments stated in Richard's briefs are of little legal consequence to the issues raised. None of his arguments addressing the trial court's frivolous finding were raised in front of the trial court. Richard and Attorney Slavik should have known that the appeal was without any reasonable basis in law or equity and could not be supported by a good faith extension, modification, or

reversal of existing law. We conclude that this appeal is frivolous. As such, the sanctions found in § 809.25 are appropriately assessed against Richard and Attorney Slavik. On remand, the trial court is instructed to determine the reasonable attorney fees and costs generated by this appeal.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.